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*[Proposed] Counsel for Martifer Aurora Solar, LLC  
and Martifer Solar USA, Inc.*

**UNITED STATES BANKRUPTCY COURT****DISTRICT OF NEVADA**

In re

MARTIFER AURORA SOLAR, LLC, a  
Nevada limited liability company,

- ☐ Affects Martifer Aurora Solar, LLC  
☒ Affects Martifer Solar USA, Inc.  
☐ Affects all Debtors

Debtor.

Case No. BK-S-14-10355-abl and  
BK-S-14-10357-abl

Jointly Administered under  
Case No. BK-S-14-10355-abl

Chapter 11

**APPLICATION FOR ORDER  
AUTHORIZING RETENTION AND  
EMPLOYMENT OF FOLEY & LARDNER  
LLP, AS SPECIAL SOLAR COUNSEL,  
NUNC PRO TUNC TO THE PETITION  
DATE**

Hearing Date: March 10, 2014

Hearing Time: 9:30 a.m.

Martifer Solar USA, Inc. ("Martifer USA" or "Debtor"), debtor and debtor in possession in the above-captioned jointly administered chapter 11 case (the "Chapter 11 Case") respectfully submits this application (the "Application") for an order pursuant to sections 327(e), 328, 1107 and 1108 of title 11 of the United States Code, §§ 101 *et. seq.* (the "Bankruptcy Code"), Rule 2014(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), Rule 2014 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the District of Nevada (the "Local Rules"), and the Verified

Statement of Jeffery R. Atkin ("Atkin Verified Statement") filed contemporaneously herewith, authorizing Debtor to retain and employ the law firm of Foley & Lardner LLP, a limited liability partnership ("Foley & Lardner" or the "Firm") as special solar counsel. In support of the Application Debtors respectfully represent as follows:

### **BACKGROUND**

1. On January 21, 2014 (the "Petition Date"), Martifer USA filed a voluntary petition with this Court for reorganization relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the "Bankruptcy Code").

2. Debtor is continuing to operate its business and manage its property as debtor in possession pursuant to Bankruptcy Code Sections 1107(a) and 1108.

3. No request has been made for the appointment of a trustee or examiner, and no statutory committee has been appointed in the Chapter 11 Case.

4. Pursuant to an Order [Dkt #72] of the Court entered January 29, 2014, the Chapter 11 Cases were administratively consolidated under the bankruptcy case of Martifer Aurora Solar, LLC ("Aurora"), case no. BK-14-10355-abl.

5. The factual background relating to the Debtor's commencement of the Chapter 11 Case is set forth in detail in the Omnibus Declarations of Klaus Bernhart in Support of First Day Motions [Aurora Dkt ##15, 40] and the Omnibus Declarations of Klaus Bernhart in Support of First Day Motions [Martifer USA Dkt ##15, 40] (together, the "Omnibus Declarations"), which are incorporated herein by this reference.

### **JURISDICTION AND VENUE**

6. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

7. The statutory basis for relief sought herein arises from Bankruptcy Code Sections 327(e), 328, 1107 and 1108, Bankruptcy Rule 2014, and Local Rule 2014.

8. Venue of this Chapter 11 Case in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

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**RELIEF REQUESTED**

9. By this Application, Debtor seeks an order authorizing the retention and employment of Foley & Lardner as special solar counsel to Debtor to continue representing and assisting Debtor with various legal matters relating to Debtor's solar projects, as described below, effective as of the Petition Date, in accordance with Foley & Lardner's normal hourly rates and reimbursement policies.

10. Prior to the Petition Date, Debtor retained Foley & Lardner to assist Debtor with legal issues arising in connection with its solar energy business. *See* Bernhart Declaration, ¶ 60; *see also*, Engagement Agreement attached as **Exhibit 1** to the Atkin Verified Statement ("Engagement Agreement"). Foley & Lardner has since represented Debtor in its solar operations, including, without limitation, project development, tax and regulatory matters specific to renewable energy projects (for example, receipt of Federal cash grants in lieu of tax credits for such projects), the sale and acquisition of solar projects and review and analysis of solar specific contracts (for example, power purchase agreements and interconnection agreements). *See* Bernhart Declaration, ¶ 60; Atkin Verified Statement, ¶ 5. Foley & Lardner has also acted as Debtor's corporate, tax, and project counsel in connection with various solar projects. *See* Bernhart Declaration, ¶ 60; Atkin Verified Statement, ¶ 5.

11. Going forward, Debtor and Foley & Lardner anticipate representation of Debtor will continue in virtually the same capacity. *See* Bernhart Declaration, ¶ 61; *see also*, Atkin Verified Statement, ¶ 6. Specifically, Foley & Lardner's renewable energy lawyers will continue to represent Debtor in connection with further project development, selling and acquiring solar projects, entering into power purchase agreements and interconnection agreements relating to such projects, and securing receipt of Federal grants and other financial incentives relating to such projects. In addition to advising Debtor on the development of Debtor's projects, Foley & Lardner will continue to represent Debtor in securing and negotiating construction contracts where Debtor provides certain construction services to third parties in exchange for certain construction fees. The specific tasks that Foley & Lardner's lawyers will provide to Debtor are necessary to allow Debtor to maximize the likelihood of a successful reorganization. *See* Bernhart Declaration, ¶ 61; *see also*, Atkin Verified Statement, ¶¶ 7-8.

12. Debtor selected Foley & Lardner because the Firm has considerable experience in legal representation renewable and solar energy matters, including project acquisitions, development, tax

1 structures and its strong reputation in the solar industry. *See* Bernhart Declaration, ¶ 62. Foley &  
2 Lardner's nationally-recognized Energy Industry Team has represented solar developers and investors  
3 for more than twenty (20) years and its attorneys have industry-leading expertise and experience.  
4 Foley & Lardner's Energy Industry Team includes more than eighty-five (85) attorneys and the entire  
5 practice and individual attorneys are frequently ranked among the best in the energy industry in peer-  
6 rated surveys. Atkin Verified Statement, ¶ 9. Debtor has determined that in order to ensure adequate  
7 representation in these types of matters, it is necessary and in the best interest of Debtor to employ  
8 Foley & Lardner as its special solar counsel to continue advising and representing it in connection with  
9 its solar operations. *See* Bernhart Declaration, ¶ 62. The services to be provided by Foley & Lardner  
10 will not be duplicative of the services provided by other professionals retained by Debtor. *See*  
11 Bernhart Declaration, ¶ 62; *see also*, Atkin Verified Statement, ¶ 10. Foley & Lardner's lawyers will  
12 work closely with Debtor's other professionals to ensure that duplicative services are not rendered. *See*  
13 Bernhart Declaration, ¶ 62; *see also*, Atkin Verified Statement, ¶ 10.

14 13. As a result of Foley & Lardner having provided services to Debtor since September  
15 2013, it possesses a unique understanding of the Debtor's solar operations that cannot be duplicated  
16 without considerable time and expense to Debtor's estate. *See* Bernhart Declaration, ¶ 63; *see also*,  
17 Atkin Verified Statement, ¶ 11. Indeed, prepetition Foley & Lardner devoted significant time to  
18 assisting the Debtor with a complex restructuring of a solar project that included complicated and  
19 critical tax components, including advising in the receipt of certain cash grants from the Department of  
20 Treasury. *See* Bernhart Declaration, ¶ 63; *see also*, Atkin Verified Statement, ¶ 11. Were Debtor  
21 required to retain new counsel to take over this representation or the other solar specific work  
22 performed by Foley & Lardner, the Debtor's estate would be severely prejudiced. *See* Bernhart  
23 Declaration, ¶ 63; *see also*, Atkin Verified Statement, ¶ 12.

24 14. There is currently no litigation pending for which Foley & Lardner has acted as counsel  
25 for Debtor. *See* Bernhart Declaration, ¶ 64; *see* Atkin Verified Statement, ¶ 13.

15. Foley & Lardner has a claim against Debtors for unpaid fees and expenses incurred prior to the Petition Date in the amount of \$78,122.86.<sup>1</sup> *See* Atkin Verified Statement, ¶ 14. Foley & Lardner did not receive any compensation from Debtor or any party on behalf of Debtor in the 90 days prior to the Petition Date. *See* Atkin Verified Statement, ¶ 14.

## **SERVICES TO BE RENDERED**

20. In light of Foley & Lardner's expertise in this area and prior experience with Debtor, Foley & Lardner is well-qualified to perform the requested services and assist Debtor in the capacity outlined herein. *See* Bernhart Declaration, ¶ 67.

21. Foley & Lardner will use reasonable efforts to coordinate with Debtor's other professionals to avoid unnecessary duplication of services. *See* Atkin Verified Statement, ¶ 18. Due to the highly specialized nature of Foley & Lardner's work for the Debtor, it is unlikely that any services rendered will be duplicative of other professionals. *See* Atkin Verified Statement, ¶ 18. However, Foley & Lardner will coordinate with Debtor and Debtor's general bankruptcy counsel to ensure that its services are complementary and not duplicative of other services being rendered. *See* Atkin Verified Statement, ¶ 18.

22. Foley & Lardner has stated its willingness to act as Debtor's special solar counsel during the pendency of this Chapter 11 Case. *See* Atkin Verified Statement, ¶ 19.

### **PROFESSIONAL COMPENSATION**

23. Subject to the Court's approval under Bankruptcy Code sections 330(a) and 331, compensation to Foley & Lardner will be payable from Debtor's estate, which shall be liable for such compensation, on an hourly basis, plus reimbursement of actual, necessary expenses and other charges incurred by the Firm.

24. As is the case with respect to rates charged in non-bankruptcy matters, Foley & Lardner's rates are subject to periodic adjustment to reflect economic and other conditions. Foley & Lardner's current hourly rates applicable to the principal attorneys and paraprofessionals proposed to represent Debtor are:

| Professional - Title                           | Hourly Rate |
|--|-------------|
| Jeff Atkin – Partner                           | \$690       |
| Jason Barglow - Partner                        | \$665       |
| Bill DuFour – Associate                        | \$450       |
| Justus Britt – Special Counsel                 | \$230       |
| John Eliason – Tax Partner                     | \$655       |
| Jason Allen – Mergers and Acquisitions Partner | \$610       |
| Matt Riopelle – Associate                      | \$455       |
| Kevin Lewman – Paralegal                       | \$300       |

Cristy Townsend – Paralegal

\$165

See Atkin Verified Statement, ¶ 20.

25. Other attorneys and paraprofessionals will render services to Debtor, as needed. Generally, Foley & Lardner's hourly rates for Partners range from \$500-\$700; for associates, hourly rates range from \$250-\$455; for paralegals, hourly rates range from \$100-300. See Atkin Verified Statement, ¶ 21.

26. There is no agreement of any nature, other than with respect to the attorneys at Foley & Lardner and payment of any contract attorneys utilized by Foley & Lardner, as to the sharing of compensation to be paid to Foley & Lardner. See Atkin Verified Statement, ¶ 22.

27. Foley & Lardner will seek compensation for its fees and expenses incurred on behalf of Debtor, consistent with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, the United States Trustee Guidelines, and any applicable rules or orders of this Court, from Debtor's estate. See Atkin Verified Statement, ¶ 23.

28. Debtor respectfully submits that the proposed fee arrangement with Foley & Lardner, as set forth above, is reasonable in light of (i) industry practice and similar to market rates both in and out of Chapter 11 proceedings, (ii) Foley & Lardner's experience in general and with Debtor's business, in particular, and (iii) work to be performed pursuant to its retention. Debtor believes that, given the nature of the legal services to be provided by Foley & Lardner, the proposed compensation arrangement is both fair and reasonable. See Bernhart Declaration, ¶ 68.

### **FOLEY & LARDNER SHOULD BE EMPLOYED NUNC PRO TUNC**

#### **TO THE PETITION DATE**

29. Debtor is seeking to retain Foley & Lardner *nunc pro tunc* to the Petition Date.<sup>2</sup> Such relief is warranted by the extraordinary circumstances presented by this case. Although Foley & Lardner has not provided significant services since the Petition Date, those services rendered have been

<sup>2</sup> Bankruptcy Courts in the Ninth Circuit possess the equitable power to approve professional employment *nunc pro tunc*. In re Atkins, 69 F.3d 970, 973-74 (9th Cir. 1995) (citing Halperin v. Occidental Fin. Group, Inc. (In re Occidental Fin. Group, Inc.), 40 F.3d 1059, 1062 (9th Cir. 1994); Okamoto v. THC Fin. Corp. (In re THC Fin. Corp.), 837 F.2d 389, 392 (9th Cir. 1988)).



1 necessary to Debtor's continued business operations and Foley & Lardner's ongoing representation of  
 2 Debtor. Without Foley & Lardner's continued representation of the Debtor, Debtor's ability to  
 3 preserve and restructure its business could have been jeopardized. Accordingly, *nunc pro tunc*  
 4 employment is appropriate under the circumstances and should be approved. See Bernhart  
 5 Declaration, ¶ 69.

#### 6 **FOLEY & LARDNER'S DISCLOSURES**

7 30. Pursuant to section 327(e) of the Bankruptcy Code, a debtor may employ an attorney  
 8 "for a specified special purpose" where such representation would be in the best interests of the  
 9 debtor's estate and the attorney "does not represent or hold any interest adverse to the debtor with  
 10 respect to the matter on which such attorney is to be employed." 11 U.S.C. § 327(e).

11 31. In connection with its potential retention by Debtor, Foley & Lardner conducted an  
 12 investigation to ascertain conflicts and connections with certain parties in interest in the Chapter 11  
 13 Cases. Atkin Verified Statement, ¶¶ 25-27. Specifically, and as detailed in the Atkin Verified  
 14 Statement, Foley & Lardner was provided a list of all creditors of Debtor and Aurora, Debtor's  
 15 directors and officers, the counter parties to all contracts with Debtor and Aurora other than counter  
 16 parties to non-disclosure agreements, Debtor's stockholders, parties to pending litigation with Debtor,  
 17 the Bankruptcy Judges for the District of Nevada, the employees of the Office of the United States  
 18 Trustee for the District of Nevada, and other professionals proposed to be retained by the Debtors (the  
 19 "Connection Parties"). Atkin Verified Statement, ¶ 27.

20 32. Foley & Lardner has conducted a thorough search of the Connection Parties using its  
 21 computerized conflicts check system, based on the list of Connection Parties received to date from  
 22 Debtor, and Foley & Lardner attorneys have made diligent efforts to search the Firm's records and  
 23 assemble pertinent information for purposes of the Atkin Verified Statement with respect to Foley &  
 24 Lardner's connections with the Connection Parties. Atkin Verified Statement, ¶ 30. If Debtor  
 25 supplements this information, Foley & Lardner will run an updated conflict search and file a  
 26 supplement to the Atkin Verified Statement. Atkin Verified Statement, ¶ 30.

27 33. Except as set forth in the Atkin Verified Statement and the exhibits thereto, the Debtor  
 28 has determined that Foley & Lardner does not hold or represent any interest adverse to the Debtors or



1 their estates with respect to the matters on which Foley is to be employed. Atkin Verified Statement,  
 2 ¶¶ 27-28. In the event that any conflicts arise on the matters on which Foley is to be retained, either  
 3 Foley will obtain appropriate waivers or the Debtors will engage special conflicts counsel and Foley &  
 4 Lardner will file a supplement to the Atkin Verified Statement. Atkin Verified Statement, ¶ 33.

### 5 NOTICE

6 34. Notice of this Application has been provided to Notice of this Application has been  
 7 provided to (i) the Office of the United States Trustee; (ii) counsel for Cathay Bank; (iii) Debtors' 20  
 8 largest unsecured creditors; (iv) those governmental agencies required to receive notice under  
 9 Bankruptcy Rule 5003(e); and (v) any parties who have requested notice in these Chapter 11 Cases.  
 10 Debtor respectfully submits that such notice is appropriate under the circumstances and that no other or  
 11 further notice is necessary or required.

### 12 NO PRIOR APPLICATION

13 35. No previous application for the relief requested herein has been made to this Court or  
 14 any other court. Atkin Declaration, ¶ 34.

### 16 CONCLUSION

17 WHEREFORE, Debtor respectfully requests entry of an order authorizing the relief requested  
 18 herein, substantially in the form attached hereto as **Exhibit A**, and granting Debtor such other and  
 19 further relief as is just and proper.

20 DATED this 10th day of February 2014.

21 **MARTIFER SOLAR USA, INC.,**

22 By /s/Klaus Bernhart

23 Klaus Bernhart, Chief Financial Officer  
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 27  
 28

1 Respectfully submitted by:

2 **FOX ROTHSCHILD LLP**

3 By /s/Brett A. Axelrod

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8 *[Proposed] Counsel for Martifer Aurora Solar, LLC*  
9 *and Martifer Solar USA, Inc.*

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EXHIBIT A

**\*PROPOSED FORM OF ORDER\***

BRETT A. AXELROD, ESQ.  
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*[Proposed] Counsel for Martifer Aurora Solar, LLC  
and Martifer Solar USA, Inc.*

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA**

In re

MARTIFER AURORA SOLAR, LLC, a  
Nevada limited liability company,

- ☐ Affects Martifer Aurora Solar, LLC  
☒ Affects Martifer Solar USA, Inc.  
☐ Affects all Debtors

Debtor.

Case No. BK-S-14-10355-abl and  
BK-S-14-10357-abl

Jointly Administered under  
Case No. BK-S-14-10355-abl

Chapter 11

**ORDER AUTHORIZING RETENTION  
AND EMPLOYMENT OF FOLEY &  
LARDNER LLP AS SPECIAL SOLAR  
COUNSEL *NUNC PRO TUNC* TO THE  
PETITION DATE**

Hearing Date: March 10, 2014  
Hearing Time: 9:30 a.m.

FOX ROTHSCHILD LLP  
3800 Howard Hughes Parkway, Suite 500  
Las Vegas, Nevada 89169  
(702) 262-6899  
(702) 597-5503 (fax)

The Court, having reviewed and considered the Application for an Order Authorizing Retention and Employment of Foley & Lardner LLP (“Foley & Lardner”) as Debtor’s Special Solar Counsel, Effective as of the Petition Date (the “Application”),<sup>1</sup> filed on February 10, 2014 by Martifer Solar USA, Inc. (“Martifer USA” or “Debtor”), debtor and debtor in possession in the above-captioned jointly administered chapter 11 case (the “Chapter 11 Case”), the Verified Statement of Jeffery R. Atkin in Support of the Application (the “Atkin Verified Statement”), the Declaration of Klaus Bernhart in Support of Retention of Debtors’ Professionals (the “Bernhart Declaration”); and with all other findings set forth in the record at the hearing noted above incorporated herein, pursuant to Fed. R. Bankr. P. 7052; and it appearing that this Court has jurisdiction to consider the Application pursuant to 28 U.S.C. §§ 157 and 1334; it appearing that venue of this Chapter 11 Case and the Application in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); the Court hereby finds (1) notice of the Application was good and sufficient as provided therein and under the circumstances; (2) Foley & Lardner does not represent or hold any interest adverse to the Debtor with respect to the matter on which Foley & Lardner is to be employed, and (c) being employed as Debtor’s special solar counsel is necessary and in the best interests of Debtor and its estate; and (3) good cause exists to approve the retention and employment of Foley & Lardner.

**NOW, THEREFORE, IT IS HEREBY ORDERED THAT:**

1. The Application is GRANTED in all respects.
2. Pursuant to 11 U.S.C. § 327(e) and Rule 2014(a) of the Federal Rules of Bankruptcy Procedure, Debtor is authorized to retain and employ Foley & Lardner as special solar counsel *nunc pro tunc* to the Petition Date, to perform the services set forth in the Application and under the terms of the Engagement Agreement attached as **Exhibit 1** to the Atkin Verified Statement.
3. Foley & Lardner shall be compensated from Debtor’s estate in accordance with the procedures set forth in the Application, 11 U.S.C. §§ 330 and 331, the Bankruptcy Rules, the Local Bankruptcy Rules and Orders of this Court.

<sup>1</sup> All capitalized terms not otherwise defined herein shall have the same meaning ascribed in the Application.

4. The terms of this Order shall be immediately effective and enforceable upon its entry.

Prepared and respectfully submitted by:

**FOX ROTHSCHILD LLP**

By \_\_\_\_\_  
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Nevada Bar No. 11057  
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Las Vegas, Nevada 89169  
*[Proposed] Counsel for Martifer Solar USA, Inc.  
and Martifer Aurora Solar, LLC*

APPROVED/DISAPPROVED:

**OFFICE OF THE UNITED STATES TRUSTEE**

By \_\_\_\_\_  
J. Michal Bloom  
Trial Attorney for Acting U.S. Trustee,  
Tracy Hope Davis

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**CERTIFICATION OF COUNSEL PURSUANT TO LOCAL RULE 9021**

In accordance with Local Rule 9021, counsel submitting this document certifies that the order accurately reflects the court's ruling and that:

- ☐ The Court has waived the requirement set forth in LR 9021(b)(1).
- ☐ No party appeared at the hearing or filed an objection to the motion.
- ☐ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, and any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below:
- ☐ I certify that this is a case under Chapter 7 or 13, that I have served a copy of this order with the motion, pursuant to LR 9014(g), and that no party has objected to the form or content of the order.

# # #